No. 78-5471

RECEIVED
MAR 17 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ORIGINAL COPY

THOMAS W. WHALEN AND JAMES E. PYNES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys
Department of Justice
Washington, D. C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5471

THOMAS W. WHALEN AND JAMES E. PYNES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in petitioner Whalen's case (Pet. App. 1a-15a) is reported at 379 A. 2d 1152. The opinion of the court of appeals in petitioner Pynes' case (Pet. App. 18a-22a) is reported at 385 A. 2d 772.

JURISDICTION

The judgment of the court of appeals in petitioner Whalen's case was entered on November 10, 1977; a petition for rehearing was denied on July 14, 1978 (Pet. App. 16a). The judgment of the court of appeals in petitioner Pynes' case was entered on April 26, 1978; a petition for rehearing was denied on July 27, 1978 (Pet. App. 23a). The petition for a writ of certiorari was filed on September 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the imposition of consecutive sentences for felony murder and the underlying felony violates the Double Jeopardy Clause in the circumstances of these cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

2. 22 D.C. Code 2401 provides in pertinent part:

> Whoever, * * * kills another purposely either of deliberate and premeditated malice * * * or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

3. 22 D.C. Code 2801 provides in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will * * * shall be imprisoned for any term of years or for life.

4. a. 22 D.C. Code 2101 provides in pertinent part:

> Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise * * * shall, upon conviction thereof, be punished by imprisonment for life or for such term as the court in its discretion may determine. * * *.

b. D.C. Code 3202 provides in pertinent part:

> (a) Any person who commits a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon * * * —

> (1) may, if he is convicted for the first time of having so committed a crime of violence in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to life imprisonment * * *.

STATEMENT

1. Whalen

Following a jury trial in the Superior Court of the District of Columbia, petitioner Whalen was convicted on two counts of felony murder (with rape and burglary as the underlying felonies), in violation of 22 D.C. Code 2401; second degree murder, in violation of 22 D.C. Code 2403; rape, in violation of 22 D.C. Code 2801; and first-degree burglary, in violation of 22 D.C. Code 1801(a). He was sentenced to concurrent terms of 20 years to life imprisonment on each felony murder count and 15 years to life imprisonment for second-degree murder, and to consecutive terms of 15 years to life imprisonment for rape and 10 to 30 years imprisonment for first-degree burglary. 1/

The evidence (the sufficiency of which petitioner does not contest) showed that on September 10, 1972, between 10:20 a.m. and 12:30 p.m., petitioner raped and strangled Rebecca Reiser in her room in the McLean Gardens apartment complex in Washington, D.C. (I Tr. 36, 52-58, 62-65; II Tr. 229). Petitioner, a maintenance worker at McLean Gardens,

1/ At the close of the government's case, the court entered a judgment of acquittal on a felony murder count and the underlying robbery count.

was in the general vicinty of the victim's building (II Tr. 123-124, 76-77, 84) and told his co-workers that he had engaged in intercourse with someone at McLean Gardens (II Tr. 136-137). Petitioner's fingerprint and palmprint were later found in the victim's room (III Tr. 326-327, 328-330; IV Tr. 500, 511-512, 521).

The court of appeals reversed the convictions for first-degree burglary and for felony murder in the perpetration of burglary because, it held, the indictment had been improperly amended (Pet. App. 4a-6a). It affirmed the convictions and consecutive sentences for rape and for felony murder in the perpetration of the rape, holding that, because the underlying felony is an "intent-divining mechanism" in the felony murder prosecution, and because the rape and felony murder statutes were meant to protect different "societal interests," the offenses did not merge (id. at 7a-9a). The court vacated the sentence for second degree murder after finding that it was a "lesser included offense of felony murder" (id. at 7a).

2. Pynes

After a jury trial in the Superior Court of the District of Columbia, petitioner Pynes was convicted of premeditated murder and felony murder (with kidnapping as the underlying felony), both in violation of 22 D.C. Code 2401, and of armed kidnapping, in violation of 22 D.C. 2101 and 3202. He was sentenced to concurrent terms of 20 years to life imprisonment on each of the murder counts and to a consecutive term of 15 years to life imprisonment for armed kidnapping.

The evidence established that on November 8, 1972, petitioner and Gregory Neal, who were then under indictment in Maryland for the robbery of Overton Bonner, met Bonner at his place of employment. They tricked him into their car by promising to return the money and property previously stolen from him if Bonner would agree not to testify against them at their robbery trial (I Tr. 261-262). Neal and petitioner then drove Bonner into Rock Creek Park, where they stopped at a picnic grove. Neal produced a gun and ordered Bonner out of the car (I Tr. 262). Outside the car, a struggle ensued between Neal and Bonner; petitioner ran over, grabbed the gun and fired twice at Bonner (I Tr. 262-263). After dropping Neal off at home, petitioner returned to the park and shot Bonner several more times to make sure he was dead (I Tr. 263).

The court of appeals affirmed petitioner's convictions (Pet. App. 18a-22a). The court upheld the consecutive sentences for armed kidnapping and for felony murder with kidnapping as the underlying charge, concluding that Pynes' case involved "not * * * a single transaction resulting in two crimes, but a series of interrelated acts resulting in two crimes which are defined by separate statutes that are not in pari materia" (id. at 19a). In addition, the court held that "the doctrine of merger is inapplicable because the transaction offended multiple societal interests and constituted separate offenses" (ibid.).

DISCUSSION

In each of these cases, the District of Columbia Court of Appeals upheld consecutive sentences imposed upon petitioners for a felony and for felony-murder committed during the course of that felony. The court found that it was the intent of Congress to allow separate punishment for the two offenses and that such action does not violate the Constitution. Petitioners mount no attack on the proposition that the imposition of cumulative punishment comports with the legislative intent. Rather, they contend that the underlying felony is a lesser included offense of felony-murder and that, by virtue of that fact, the Double Jeopardy Clause bars the imposition of cumulative punishments.

The general issue of the constitutionality of cumulative punishment for felony-murder and an underlying felony may be broken down into two components: First, is the underlying felony the "same" offense as felony murder for constitutional purposes (presumably on the basis that it is a lesser included offense); if it is not, then the question of the permissibility of cumulative punishments is purely one of legislative intent. Second, if the underlying felony is the "same" offense, so that successive trials would be barred by the Double Jeopardy Clause (Brown v. Ohio, 432 U.S. 161 (1977)), does the Clause also bar cumulative punishments even if the legislature intended to permit them.

Because the decision in this case appears to be in conflict with decisions of the District of Columbia Circuit and of several state supreme courts, and because decisions of this Court have left some uncertainty regarding the proper disposition of this constitutional issue, we do not oppose review in this case of the claim of petitioner Whalen. For reasons discussed below, we believe the issue is irrelevant to the proper disposition of petitioner Pynes' case and accordingly oppose his request for review.

1. Any inquiry into whether two offenses are the "same" for purposes of the permissibility of cumulative punishments must begin with a consideration of the applicability of the so-called "Blockburger test." See Blockburger v. United States, 284 U.S. 299 (1932). The test was originally articulated as a means of "identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction" (Iannelli v. United States, 420 U.S. 770, 785 n. 17 (1975)), and the constitutional significance of the test has never been fully fleshed out. In essence, the test provides that the criterion for determining identity of offenses is not the evidence actually adduced to prove the offenses in any particular case, but the elements of the offenses: if each offense requires proof of an element that the other does not, the offenses are considered separate under the Blockburger test.

It appears tolerably clear that if offenses are different under the Blockburger test, there is no constitutional impediment to imposition of cumulative punishment so long as such action is consonant with legislative intent. See Gore v. United States, 357 U.S. 386, 392 (1958). If, on the other hand, application of the test leads to the conclusion that the offenses are the same, the constitutional consequences are less clear. In Brown v. Ohio, supra, 432 U.S. at 166, a case involving successive trials, the Court described the Blockburger test as "[t]he established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment * * *." See also Simpson v. United States, 435 U.S. 6, 11 (1978).

Despite the dictum in the Brown opinion, the plurality opinion in Jeffers v. United States, 432 U.S. 137 (1977), handed down

the same day as Brown and concurred in by the author of Brown, seems to suggest that the constitutionality of cumulative punishment for a greater and a lesser included offense is an open question. "The critical inquiry is whether Congress intended to punish each statutory violation separately. * * * * If some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties." 432 U.S. at 155. Because the Court in Jeffers concluded that Congress did not intend to permit multiple punishments for the offenses there under examination, it was deemed "unnecessary to reach the lesser included offense [punishment] issue" (ibid.).

2. The question whether the legislature may authorize multiple punishment for offenses that -- like rape and felony-murder -- appear quite distinct as a matter of legislative policy but may prove to be the "same" upon subjection to an abstract test evolved by the judiciary arises only if the judicial test in fact classifies the two offenses as the "same" under the particular statutory scheme and other pertinent circumstances of a particular case. 2/

At first blush (and, we believe, upon final analysis), application of the Blockburger test to offenses such as rape and felony-murder appears to lead to the conclusion that the offenses are different. Carnal knowledge is an element of the former but not the latter, whereas felony-murder requires a killing and rape does not.

2/ The question also need not be reached, of course, if, as in Simpson and Jeffers, the legislative history evidences an intent not to permit imposition of cumulative punishment. Here, however, the court of appeals concluded that the felony-murder statute and the rape (or, in Pynes' case, kidnapping) statute were meant to protect distinct social interests and that the imposition of cumulative punishments thus accorded with the congressional intent. We do not understand petitioners to challenge this conclusion; rather, they contend it is irrelevant to the constitutional multiple punishment issue.

Petitioners apply the Blockburger test in a somewhat different manner. Although each offense is defined to include an element that the other does not, they point out, correctly, that a jury could not convict of felony-murder without necessarily finding the defendant to have committed an underlying felony. Thus, they reason, (a) the felony is a lesser included offense of felony murder, (b) a lesser included offense is the "same" offense for double jeopardy purposes as the greater offense, and therefore (c) the two offenses are not different under the Blockburger test and may not be cumulatively punished. Pet. 7-8.

Whether our view or that of petitioners is correct depends upon whether all lesser included offenses are ipso facto the "same" as the greater offense under the Blockburger test, regardless of identity of elements, or whether only necessarily included offenses are the "same". We believe that the latter approach, which clearly produces more sensible results in cases like this (see also point 3, infra), is preferable. There is, however, some support for petitioners' view in this Court's summary reversal in Harris v. Oklahoma, 433 U.S. 682 (1977), which barred a successive trial for the underlying felony after a conviction for felony-murder.

We believe that the result in Harris, which was decided summarily and without any extended analysis of what is a conceptually complex issue, would bear reexamination. In any event, Harris is not necessarily controlling here, because this case involves the Double Jeopardy Clause's restriction against multiple punishments, not successive trials. These two distinct aspects of the Clause involve different interests, and offenses that are deemed the "same" for purposes of barring successive trials may not be so for punishment purposes. As the Court noted in Brown v. Ohio,

supra, 432 U.S. at 165 "the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." Of course, the legislature is no more free than other branches to circumvent the Clause's prohibition against successive trials for the same offense. The legislature may, however, legitimately "circumvent" the prohibition against cumulative punishment for the same offense simply by enhancing the punishment for crimes committed under aggravating circumstances. 3/ Thus a substantial question arises whether offenses that are conceptually the "same" for successive trial purposes should automatically be characterized as the "same" for purposes of imposition of punishment.

3. If petitioners are correct that double jeopardy principles bar multiple punishments whenever the commission of one of a class of offenses is a predicate to conviction of a second offense, the principle would have significant consequences considerably beyond its impact on felony-murder cases. Perhaps the most obvious instance is 18 U.S.C. 924(c), which bars the use of or unlawful carrying of a firearm in the commission of any federal felony. In order to convict for an offense under that provision, the jury necessarily must find the commission of an underlying felony. Thus, under petitioners' analysis, the predicate felony is a "lesser included offense" of the firearms charge, and cumulative punishments,

3/ For example, the legislature could provide that whoever kills another while committing a felony shall be sentenced to a minimum term of from 20 to 35 years' imprisonment and a maximum of life imprisonment. This would accomplish exactly the same result as the present scheme yet would appear to be immune from attack on double jeopardy grounds.

although expressly mandated by Congress, would apparently be constitutionally barred. The same problem may arise with a number of other federal statutes. E.g., 18 U.S.C. 1962 (conduct of enterprise through a pattern of racketeering activity); 21 U.S.C. 848 (continuing criminal enterprise involving substantive narcotics offenses).

Petitioners' position would also render felony-murder statutes virtually useless in many cases (except where the death penalty may be sought). Under the federal statutory scheme as well as that of most states, the presence of the underlying felony serves the narrow function of elevating what would otherwise be second-degree murder into first-degree murder without the necessity of proof of premeditation. See, e.g., 18 U.S.C. 1111(a). If a conviction for felony-murder bars punishment for the underlying felony, the bringing of a felony-murder charge would often actually diminish the amount of punishment to which the defendant is exposed as compared to charging the underlying felony and second-degree murder (which two charges could, even under petitioners' theory, be cumulatively punished). Thus the rule for which petitioners contend subverts the legislative policy of treating murders committed in the course of a felony more seriously than others.

4. While we believe that the decision of the court of appeals is correct, the foregoing discussion indicates that it involves a question of some importance and difficulty that has not been directly addressed or clearly resolved by prior decisions of this Court. In addition, as petitioners correctly note (Pet. 10), the decision conflicts with the disposition of the same issue by the District of Columbia Circuit (e.g., United States v. Greene, 489 F. 2d 1145 (1973), cert. denied, 419 U.S. 977 (1974)); the issue is also the subject of conflicting decisions on federal constitutional grounds among state supreme courts (see cases cited at Pet. 11-12). This disagreement further suggests the propriety of review by this Court.

5. Only the case of petitioner Whalen properly presents this issue for review. Petitioner Pynes was convicted not only of felony-murder, but also of first-degree murder for the same slaying. He received identical concurrent sentences on both murder counts. He does not attack the validity of his first-degree murder conviction, and he could not and does not suggest that armed kidnapping, for which he received a consecutive sentence, is a lesser included offense of first-degree murder. Under these circumstances, the only relief to which he would be entitled would be vacation of the felony-murder conviction. While we believe that the court of appeals should have done this, its failure to do so is of no practical consequence and presents no occasion for review by this Court.

6. Petitioner Whalen's situation is different. He was convicted of rape, felony-murder, and second-degree murder and given sentences totalling 35 years to life imprisonment. His second-degree murder conviction (on which he was sentenced to 15 years to life) was vacated by the court of appeals solely on the ground that it was a lesser included offense of felony-murder (on which he received a concurrent term of 20 years to life). Petitioner now seeks to have the consecutive sentence on the rape charge eliminated. If he is correct that rape and felony-murder are the "same" offense for multiple punishment purposes, the proper course for the court of appeals would have been to vacate the felony-murder conviction and uphold the rape and second-degree murder convictions and sentences. If this Court now agrees with petitioner Whalen and rejects the holding of the court of appeals, it should vacate the judgment of the court of appeals and remand the case, pursuant to 28 U.S.C. 2106, for the purpose of allowing reinstitution of the second-degree murder conviction and sentence.

We note in closing that, at least in the context of felony-murder cases, this decision would have little practical impact in the federal system because of the governing parole statute (18 U.S.C. 4205(a)), which provides that in the case of any sentence or sentences cumulating to more than a maximum of 30 years, the prisoner is eligible for parole after 10 years (obviously the parole release decision itself would not be influenced by the technical "same offense" concepts at issue here, but rather by the conduct underlying th conviction). Because petitioner Whalen has been convicted of offenses under the District of Columbia Code, however, Section 4205(a) is inapplicable, and the outcome of this case would determine whether he must serve a minimum of 30 or of 35 years before becoming eligible for parole.

CONCLUSION

We do not oppose grant of Whalen's petition. The petition of Pynes should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys

MARCH 1979